

THE VIRGINIA FOUNTAINHEAD ALLIANCE

1011 EAST MAIN STREET, RICHMOND, VIRGINIA 23219

November 8, 2010

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Madam or Sir:

On behalf of the Virginia Fountainhead Alliance, I am submitting these comments on the Virginia Phase I Watershed Implementation Plan (WIP). The Alliance is a new organization representing residential, commercial and mixed use developers, large land owners and related businesses that promote environmental solutions that are both based on sound science and consistent with economic growth and prosperity. The Alliance is dedicated to improving water quality in Virginia and in the Chesapeake Bay.

Without question, establishing a total maximum daily load (TMDL) and a watershed implementation plan (WIP) for the Chesapeake Bay will mark an important milestone in Virginia's necessary efforts to restore the Bay. However, it is also hard to overstate the potential effect that the TMDL process could have on Alliance members and the Virginia economy. Essentially, the process involves the EPA setting the levels of phosphorus, nitrogen, and sediment that Virginia can discharge into the Chesapeake Bay. Virginia is then required to provide "reasonable assurance" that those limits are met. If Virginia fails to provide such assurance, EPA will impose what it previously described as "consequences," but now refers to as "federal backstops." EPA imposed nutrient limits have the very real potential to become caps on business activities and economic growth.

Cleaning up the Bay is and well should be a priority for the EPA, Virginia, and the Alliance. The EPA, however, set unrealistic deadlines for establishing the TMDL. Even though the EPA itself was unable to keep to the schedule, it insisted that Virginia and the other Bay states do so. Public comment was limited to a scant 45 days. It was not until July 1 that EPA produced the draft allocation numbers for nitrogen and phosphorus and not until August 15 that EPA produced a draft allocation for sediment. First drafts of the Virginia WIP were due September 1! Thus, Virginia was given two weeks to devise a sophisticated solution for a complex problem that has been more than 400 years in the making.

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Worse, EPA's draft allocation numbers are wrong. EPA admits that its new model used to determine its allocations is flawed. First, the model does not properly account for the amount of impervious surface in the Bay watershed. The amount of impervious surface in the watershed is directly related to the amount of pollutants that flow into the Bay. Getting impervious surface wrong goes to the heart of the exercise. Second, the new model does not fully take into account the best management practices (BMPs) that businesses employ to mitigate the flow of pollutants into the Bay. EPA estimates that it will take six months to correct the flaws in the new model. Phase I was scheduled to end this year. However, Virginia will likely be required to revise its Phase I WIP next year in response to EPA's "corrected" allocation numbers – at the same time it is contending with Phase II allocations at the local level.

It is hard to imagine how serious people confronting such a serious problem could devise such a frivolous process. For the Virginia TMDL and WIP process to be a success, it must at a minimum be thoughtful, contain necessary and cost-efficient measures, and it must represent the stable consensus of opinion of those who will live under its strictures for decades to come. The process that EPA imposed upon Virginia – a process long on flawed and tardy data but short on time for deliberation and opportunity for public comment – has not produced that result.

EPA has insisted upon this badly flawed and rushed process despite the fact that Virginia has made substantial progress in reducing the flow of nitrogen and phosphorus into the Bay. Since 1985, Virginia's nitrogen load has been reduced from about 90 million lbs/year to just above 60 million lbs/year; phosphorus has been reduced in that time period from about 12 million lbs/year to about 6 million lbs/year.

The following are several specific problems with the Chesapeake Bay TMDL and the Virginia Phase I WIP.

- The EPA has not conducted a cost analysis for the Bay TMDL. As a result, the EPA's actions will likely result in crippling costs being imposed on Virginia businesses, localities and the Virginia economy. Fairfax County, for example, estimates that it will spend \$90 million each year until 2025 for stormwater retrofits alone.
- The development community bears a disproportionate burden under the draft WIP. Urban/suburban stormwater accounts for 8.7% of the flow of nitrogen and 13.7% of the flow of phosphorus into the Bay. Under the WIP submitted to EPA, urban/suburban stormwater nitrogen flows are to be reduced by 43% and phosphorus flows reduced by 68.3%. By comparison, agriculture, which accounts for 37.0% and 45.5% of nitrogen and phosphorus flow, respectively, into the Bay is expected to reduce flows of nitrogen and phosphorus by 25% and

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30% respectively, while wastewater, responsible 30.4% and 25.1% of nitrogen and phosphorus flow, respectively, is expected to *increase* flows of nitrogen and phosphorus into the Bay. These are not the allocations that were recommended by the Stakeholders Advisory Group (SAG) and we do not believe that they should be included in the WIP.

- The WIP contains the goal that “allocations for newly developed land will be set at a level that results in no increase above 2025 average nutrient loads per acre from previous uses; unless offsets are obtained in the event on-site controls will not fully achieve allowable loads.” This goal will likely result in a phosphorus standard lower than the one proposed by the Kaine Administration in 2009 and possibly even lower standards for individual tributaries. Nitrogen standards are likely to be equally stringent. Such standards are likely to be economically unfeasible and, being based on modeling that is flawed, also likely to be unnecessary.

Last July, at an oversight hearing of the Virginia House of Delegates Committee on Agriculture, Chesapeake and Natural Resources, the Alliance called for enlargement of time in order to produce a state WIP that is thoughtful, necessary, cost-effective, and representative of a stable consensus. The compressed schedule, the lack of meaningful opportunity for public comment, and the reliance on flawed and tardy data have produced a result that is unworthy of its stated goal: restoration of the national treasure that is the Chesapeake Bay. The Alliance continues to believe that doing it right is more important than doing it fast and recommends expanding the time to provide for an inclusive and truly deliberative process.

Thank you for the opportunity to submit these comments.

Sincerely,

/s/

David E. Anderson
Executive Director